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No. 88-1008

In the

Supreme Court of the United States

October Term, 1988

RONALD ALMAN, as Trustee, Board of Trustees, Northeast Department, ILGWU Health and Welfare Fund, ILGWU Health Services Plan and ILGWU National Retirement Fund,

Petitioner,

v.

GEORGE MANUFACTURING CORP.
and
GEORGE KALELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Absent facts sufficient to "pierce the corporate veil" of a corporation, is an individual shareholder or corporate officer personally liable under the Employee Retirement Income Security Act for contributions owed by the corporation to multiemployer health, welfare and pension funds?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Ronald Alman ("Alman"), a trustee of various multiemployer benefit funds in the garment industry, Respondent George Kalell ("Kalell"), and George Manufacturing Corp. ("George Mfg."), the corporation of which Kalell was the sole shareholder and president.

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BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, George Kalell, respectfully prays that the Court deny the Petition for a Writ of Certiorari sought by Petitioner Ronald Alman to review the memorandum and order of the United States Court of Appeals for the First Circuit entered in the above-entitled proceeding on July 21, 1988.

OPINIONS BELOW

The memorandum and order of the United States Court of Appeals for the First Circuit is not reported and is reprinted as an appendix to the petition at page A-1.

The opinion and judgment of the United States District Court for the District of Massachusetts (Tauro, J.) is reported at 680 F.Supp. 56 and is reprinted as a supplemental appendix to the petition at pages B-1 - B-6.

JURISDICTION

The United States Court of Appeals for the First Circuit entered judgment on July 21, 1988. Petitioner seeks review of the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

Petitioner's claim does not involve any provisions of the Constitution of the United States of America. Rather, Petitioner's claim involves the construction and interpretation of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* The specific provisions involved in Petitioner's claim are 29 U.S.C. § 1145, which requires certain employers to make contributions to multiemployer plans, and 29 U.S.C. § 1002(5), which defines "employer" for the purposes of ERISA. In addition, because Petitioner attempts to draw an analogy between ERISA and the Fair Labor Standards Act ("FLSA"), this action involves 29 U.S.C.

§ 203(d), the FLSA definition of "employer" and 29 U.S.C. § 206(a), the FLSA provision which requires all employers to pay wages in accordance with the FLSA.

The text of 29 U.S.C. § 203(d), 29 U.S.C. § 1002(5), and 29 U.S.C. § 1145 are reproduced in the petition at pages 4-8. The petition does not include the text of 29 U.S.C. § 206(a), which is reproduced in pertinent part below:

Section 206. Minimum Wages

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section. . . .

29 U.S.C. § 206(a).

STATEMENT OF THE CASE

A. Statement of Prior Proceedings

On July 31, 1985, petitioner Alman filed a Complaint against George Manufacturing Corp. ("George Mfg.") and George Kalell ("Kalell"), the sole shareholder and president of George Mfg. The Complaint sought, pursuant to Sections 502(a)(3) and 515 of ERISA, 29 U.S.C. § 1132(a)(3) and § 1145, to collect contributions owed by

George Mfg. to the various multiemployer funds (the "Funds"), of which Alman is trustee. A Consent Judgment was entered against George Mfg. on October 28, 1985, in the amount of $119,358.94, while the action against Kalell proceeded.

Alman filed a Motion for Summary Judgment and Kalell filed a Cross Motion for Summary Judgment. On February 16, 1988, the District Court issued an Opinion and Order allowing Kalell's Cross Motion for Summary Judgment and denying Alman's Motion for Summary Judgment. *Alman v. George Mfg. Corp.*, 680 F. Supp. 56 (D.Mass. 1988). The District Court held that a corporate officer or shareholder may be personally liable for a corporation's unpaid contributions to multiemployer plans only if the circumstances require a piercing of the corporate veil. *Id.* at 58. Since Alman conceded that there was no factual basis to pierce the corporate veil of George Mfg., *Id.* at 58, n.4, the District Court entered judgment for Kalell.

Shortly after the District Court allowed Kalell's Cross Motion for Summary Judgment, the United States Court of Appeals for the First Circuit issued its opinion in a case which presented issues virtually identical to those in *George Mfg. Corp. See, Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988), ("Starrett"). The Opinion in *Starrett* is reproduced as an appendix to the petition at pages A-2 to A-15.

In *Starrett*, the United States Court of Appeals for the First Circuit adopted the reasoning of the District Court in *George Mfg. Corp.*, and held that, absent factors which would justify "piercing the corporate veil", a corporate

officer or shareholder could not be held personally liable for unpaid contributions because such an individual was not "obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement," as required by 29 U.S.C. § 1145. 845 F.2d at 25.

Alman filed an appeal from the District Court's judgment in favor of Kalell. On July 21, 1988, the United States Court of Appeals for the First Circuit granted Kalell's Motion for Summary Disposition and affirmed the judgment of the District Court. The Memorandum and Order of the Court of Appeals, which is reproduced as an appendix to the petition at page A-1, made plain that its decision was based on its earlier holding in *Starrett*.

On December 15, 1988, Petitioner Alman sought review of the decision below by filing a Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

B. Statement of Facts

The District Court summarized the facts in this case in its Memorandum. Briefly stated, George Kalell was the sole shareholder and president of George Mfg., a Massachusetts corporation engaged in the business of garment manufacturing in Boston, Massachusetts. George Mfg. was a party to a collective bargaining agreement with an affiliate of the International Ladies' Garment Workers' Union. George Kalell was not a party to the collective bargaining agreement and signed the agreement solely in his capacity as president of George Mfg. The collective

bargaining agreement required George Mfg. to contribute to the Funds of which petitioner Alman is a trustee.

George Mfg. experienced financial problems and became delinquent in its contributions to the Funds. George Mfg. eventually terminated its operations, at which time it owed the Funds $119,359. As the Funds concede, nothing in Kalell's dealings with George Mfg. would allow the Funds to "pierce the corporate veil". *George Mfg. Corp.*, 680 F.Supp. at 58, n.4.

REASONS FOR DENYING THE WRIT

The Court should deny certiorari because the petition does not present a significant issue of constitutional interpretation or an important question of federal law. The decision of the United States Court of Appeals is not in conflict with other decisions of the Circuit Courts of Appeals, not in conflict with Congressional intent as expressed in ERISA and not in conflict with prior decisions of the United States Supreme Court. Further, there is no connection between this case and any case pending before this Court. There is no compelling reason to grant the petition and hear this case.

A. There is No Constitutional Issue or Important Question of Federal Law

The Petition does not present the Court with any constitutional issue. Instead, Petitioner seeks review of the decision issued by the United States Court of Appeals for the First Circuit which, by its reliance upon *Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving*

Corp., 845 F.2d 23 (1st Cir. 1988), adopted *Starrett's* holding that corporate officers or shareholders could not be liable for contributions owed by the corporation to a multiemployer fund absent facts sufficient to "pierce the corporate veil." The Petitioner opposed this interpretation of ERISA in the District Court and in an *amicus curiae* brief filed with the Court of Appeals in *Starrett*, as well as in a brief filed in the Court of Appeals below. Alman now seeks review of this interpretation of federal law in the United States Supreme Court.

In place of the interpretation of federal law adopted by the United States Court of Appeals for the First Circuit, the Petitioner proposes an interpretation of ERISA that ignores the plain meaning of 29 U.S.C. § 1145, which requires contributions to be made to multiemployer funds only by an employer "who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement." *See North Dakota v. United States*, 460 U.S. 300, 312 (1983) (absent a clearly expressed legislative intention to the contrary, language of a statute is ordinarily regarded as conclusive).

Petitioner ignores the plain meaning of this statute and instead focuses on a flawed analogy between ERISA and the Fair Labor Standards Act ("FLSA"). Petitioner first notes that ERISA's definition of "employer", 29 U.S.C. § 1002(5) is very similar to that of the FLSA, 29 U.S.C. § 203(d). Petition at 21. Petitioner then observes that the FLSA definition of "employer" has been interpreted to include controlling officers or shareholders under an "economic reality" test. Petition at 22. *See Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) (officer

or shareholder who in economic reality controls the corporation is individually liable for the nonpayment of wages to the employees of the corporation). Given the similarity between the ERISA and FLSA definitions of "employer" Petitioner argues that the "economic reality" test should also apply to cases under ERISA, thus imposing personal liability upon a controlling shareholder or officer when a corporation fails to make required contributions to multiemployer funds.

Both the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit decided that they could not ignore the plain language of 29 U.S.C. § 1145 and adopt the analogy suggested by Petitioner. There is no compelling reason for the United States Supreme Court to review those decisions.

Petitioner's analogy between the FLSA and ERISA is fatally flawed because it fails to recognize the difference between the liability-creating provisions of the FLSA, 29 U.S.C. § 206, and ERISA, 29 U.S.C. § 1145. The relevant provision of FLSA provides in pertinent part that "every employer shall pay to each of his employees . . . wages at the following rates. . . ." 29 U.S.C. § 206(a).

This provision statutorily requires *all* employers to pay certain wages,whether or not those employers are so obligated by the terms of a collective bargaining agreement. That being the case, once a court decides that an individual officer or shareholder is an employer under the FLSA, it inevitably follows that such individuals, like

all other employers, are bound to pay wages in accordance with 29 U.S.C. § 206(a) and are personally liable if they do not.

In contrast to the FLSA, the relevant provision of ERISA, 29 U.S.C. § 1145, does not require *all* employers to make contributions to multiemployer plans, only those employers who are obligated to contribute under the terms of a particular multiemployer plan or the terms of a collectively bargained agreement. Since Kalell was not obligated to contribute either by the terms of the plans or of the collective bargaining agreement, he is not liable for unpaid contributions. Thus, the question of whether or not Kalell is an "employer" under 29 U.S.C. § 1002(5) is not dispositive, because, even assuming that Kalell is an employer, under the plain language of 29 U.S.C. § 1145 he is not an employer who is obligated to contribute to the Funds of which Petitioner is a trustee.

Petitioner claims that "[i]n the years since ERISA's passage, the Court has granted certiorari to hear a number of cases involving key questions central to the effectiveness [sic] administration of the statute." Petition at 19. The simple response to this argument is that this Court has often denied certiorari in cases involving provisions of ERISA which, like 29 U.S.C. § 1145, apply only to multiemployer plans. Most recently, the Court refused to hear a case from the United States Court of Appeals for the First Circuit which posed a very similar issue, i.e. whether an individual shareholder or officer could be held personally liable for a corporation's withdrawal liability under ERISA, absent facts sufficient to "pierce the corporate veil" of the corporation. *Debreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877 (1st Cir. 1987), *cert. denied*,

___ U.S. ___, 108 S. Ct. 1024 (1988). Certiorari has also been denied in other cases involving questions of first impression under the multiemployer provisions of ERISA. *See, Trustees of the Amalgamated Insurance Co. v. Geltman Industries, Inc.*, 784 F.2d 926 (9th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986) (denial of certiorari where issue was the application of 29 U.S.C. § 1405(a) and (b), which provide two different methods of limiting the withdrawal liability claims of multiemployer pension plans).

B. There is No Conflict in the Circuit Courts of Appeals

The Petition for a Writ of Certiorari should be denied since there is no split of opinion in the Circuit Courts of Appeals which the United States Supreme Court should resolve. *Rules of the Supreme Court of the United States*, Rule 17.1(a). The decision of the United States Court of Appeals for the First Circuit is consistent with those of the three other Court of Appeals which have directly addressed this issue. In *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985), the United States Court of Appeals for the Third Circuit, using an analysis virtually identical to that of the District Court in *George Mfg. Corp.*, rejected the FLSA analogy relied upon by the Petitioner, holding that "in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute." *Id.* at 355. A similar conclusion was reached by the United States Court of Appeals for the District of Columbia Circuit in *Int'l Brotherhood of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546 (D.C.Cir. 1988). In *Kracher*, the Court of Appeals cited *Starrett* with approval and

relied upon reasoning very similar to that of the District Court in *George Mfg. Corp.* and the Court of Appeals in *Starrett*. 856 F.2d at 1549 and 1550, n.26. The United States Court of Appeals for the Ninth Circuit has reached a similar conclusion. *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513 (9th Cir. 1984).

As a result, in what may be the most important consideration in determining whether or not to grant certiorari, the Circuit Courts of Appeals are in complete agreement.

C. There is No Conflict with Congressional Intent

The Petition for Writ of Certiorari should be denied because there is no conflict between the decisions of the United States Court of Appeals for the First Circuit in *George Mfg. Corp.* and *Starrett* and the intent of Congress in enacting ERISA, particularly Section 515 of ERISA, 29 U.S.C. § 1145, the provision crucial to this case. In *Starrett*, the United States Court of Appeals for the First Circuit reviewed the legislative history of 29 U.S.C. § 1145 and found that the "legislative history . . . indicates that the language means what it says." 845 F.2d at 25. The legislative history is replete with statements which make it plain that this section only imposes a duty to contribute on "employers that are already contractually obligated to make contributions to multiemployer plans." Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., the Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration at 44 (Comm. Print 1980). Thus

Petitioner is in error when he argues that the decision in *Starrett* "produces an illogical result at variance with the statute's plain meaning and its broad remedial purposes." Petition at 22.

D. There is No Conflict with Prior Decisions of this Court

Petitioner argues that the decision of the Court of Appeals in *Starrett* misapprehends the decision of this Court in *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, ___ U.S. ___, 108 S. Ct. 830 (1988). In the first place, even a cursory review of *Starrett* demonstrates that the Court of Appeals' discussion of *Advanced Lightweight Concrete* was not central to its decision, but merely one of many reasons for accepting the plain meaning of 29 U.S.C. § 1145, i.e. that the statute only applies to employers who are contractually obligated to contribute to multiemployer plans. The Court of Appeals was correct when it took note of the fact that this Court had held in *Advanced Lightweight Concrete* that 29 U.S.C. § 1145 only permits multiemployer plans to bring suit for contractually required contributions, as opposed to contributions which might be due under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 185(a). ___ U.S. at ___, 108 S. Ct. at 835 (1988).

E. There is No Connection Between this Case and Any Case Pending Before this Court

Petitioner asserts that this case should be considered in conjunction with *Commonwealth v. Morash*, 402 Mass. 287, 522 N.E.2d 409, *cert. granted*, ___ U.S. ___, 109 S. Ct. 53 (1988). Petition at 25. However, as Petitioner freely acknowledges, the issue presented by *Morash* is simply

whether a Massachusetts statute imposing criminal penalties for non-payment of vacation pay is preempted by ERISA. Petition at 26. *Morash* does not raise any of the issues involved here, nor does it interpret the various statutory provisions involved in *George Mfg. Corp.* Conversely, *George Mfg. Corp.* does not deal with preemption under ERISA. The only thing that *George Mfg. Corp.* and *Morash* have in common is that both involve ERISA, hardly a reason for the Court to grant certiorari in this case.

CONCLUSION

The Respondent, George Kalell, respectfully urges that the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied as there is no constitutional issue, no conflict among the Circuit Courts of Appeals, no conflict with Congressional intent and purpose, and no conflict with prior decisions of this Court created by the decision of the United States Court of Appeals for the First Circuit in *Alman v. George Mfg. Corp.* The Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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